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IN THE

Supreme Court of the United States

No. 326.

October Term, 1948.

FRANK A. COLONELL,
Petitioner,

v.

BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET and LIBBY GOODMAN, Individually and Trading as P & G REALTY CO., and PARKWAY OIL COMPANY, a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET AND LIBBY GOODMAN, INDIVIDUALLY AND TRADING AS P & G REALTY CO., AND PARKWAY OIL COMPANY, IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET AND LIBBY GOODMAN, INDIVIDUALLY AND TRADING AS P & G REALTY CO., AND PARKWAY OIL COMPANY, IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals to which the writ of certiorari is here sought, is reported at 169 F. (2d) 275. In it, the Court, *per curiam*, affirmed the judgment of the District Court "upon the careful opinion of Judge Kirkpatrick." The opinion of the District Court is reported at 78 F. Supp. 845.

JURISDICTION.

The judgment of the Court of Appeals (R. 393a-394a) was entered July 2, 1948. The petition for a writ of certiorari was filed September 29, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (superseded by Section 1254 (1) of the Judicial Code, approved June 25, 1948, which became effective September 1, 1948).

STATEMENT.

The facts, viewed in the light most favorable to petitioner, as to the making of his oral contract for a commission on the sale of Parkway Oil Company's stock, and as to the steps leading up to and culminating in the sale, are adequately set forth in the opinion of the District Court (R. 381a-383a, 78 F. Supp. at 845-6). While there are inaccuracies in petitioner's statement, we do not believe it necessary to go into them in detail for purposes of this brief.

Instead, we shall refer to the more important discrepancies in petitioner's statement in connection with our argument on the questions presented by petitioner.

ARGUMENT.

1. Illegality of the Contract and Necessity for Pleading It.

(Petitioner's Questions 1, 2 and 3.)

Petitioner in his brief, directly or by innuendo, has attempted to invoke virtually every ground upon which this Court has declared the issuance of a writ of certiorari to a Court of Appeals to be justified. If the petition and the accompanying brief are read alone, this would appear to be a complicated case determined in the Courts below by a close decision.

Actually, the opinion of the Trial Judge on the entry of judgment for defendants is neither obscure nor tortuous. It consists of a concise statement of basic principles barring recovery by the petitioner. And the Court of Appeals, far from evidencing any difficulty with the case, unanimously affirmed the District Court without finding it necessary to go beyond Judge Kirkpatrick's opinion, except to comment upon its "careful" nature.

Why, then, this apparent ease of both Courts below in reaching a decision, as opposed to the petitioner's involved presentation of the issues? Because the District Court and the Circuit Court plainly saw the fundamental issue in this case, and having resolved it against petitioner, found little else to discuss, while petitioner, unable to refute the principle underlying the decision below, has sought to obscure it by creating a multiplicity of issues.

Simply stated, the question is one of morals. None of the judges below had any doubt that the sales manager of an oil company could not, consistent with fundamental concepts of decency and morality, be permitted to recover compensation for services, the result of which was to lose for his employer its largest customer in the Philadelphia area,—one whose patronage it had enjoyed for more than six and a half years (R. 24a, 87a). The contract upon which peti-

tioner sought to recover was based upon a violation of his fiduciary duty to his employer, and as such was condemned by "broad considerations of public policy". The rule of public morality applied by the Courts below is succinctly set forth in Section 570 of the Restatement of Contracts.

For a much less serious violation of fiduciary duty, Circuit Judge Kalodner, as a District Judge, denied recovery on a bargain which was merely in contravention of a policy of plaintiff's employer. **Pollock v. MacElree**, 56 F. Supp. 961 (E. D. Pa. 1944). And in **Reiner v. North American Newspaper Alliance**, 239 N. Y. 250, 181 N. E. 561 (1932), rules of morality were applied to sustain a defense to a contract action even where no fiduciary obligation was breached.

The basic principle underlying the denial of recovery to petitioner has long been part of the law of Pennsylvania, as well as other jurisdictions, and has been recognized by this Court.[1]

Nor did the Courts below have any difficulty with petitioner's argument that respondents had waived the defense of illegality by failing to plead it. Actually, respondents did specifically raise this defense at the end of petitioner's direct testimony, and before starting their own, and the Trial Court exercised its clear discretion under

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[1] See **Wolfe et al. v. International Re-Insurance Corporation**, 73 F. (2d) 267 (C. C. A. 2d, 1934); **Myers v. Hodges**, 2 Watts (Pa.) 381 (1834); **Everhart v. Searle**, 71 Pa. 256 (1872); **Johnson**, to use of **McCarter v. Nippert (No. 1)**, 294 Pa. 464 (1928); **The Pennsylvania Railroad Co. v. Flanigan**, 112 Pa. 558 (1886); **New Haven Road Const. Co. v. Long, et al.**, 269 Mass. 16, 168 N. E. 161 (1929); **Rhoades v. Malta Vita Pure Food Co.**, 149 Mich. 235, 112 N. W. 940 (1907); **Atlee et al. v. Fink**, 75 Mo. 100 (1881); *cf.* **Oscanyan v. Arms Company**, 103 U. S. 261 (1880); **The Michigan Steel Box Co. v. The United States**, 49 Ct. Cl. 421 (1914).

Rule 15 (b) of the Rules of Civil Procedure in allowing the amendment.

But Judge Kirkpatrick regarded this amendment as unnecessary, and as having been offered by respondents "out of what appeared to the Court an abundance of caution" (R. 387a, 78 F. Supp. at 848). For it is perfectly plain that if illegality of a contract appears at any stage of the trial, and certainly where it appears from plaintiff's own proof, defendant may take advantage of it by motion, or, if need be, the Court will itself raise the objection. **1 Moore's Federal Practice**, p. 568; **Fitzsimons v. Eagle Brewing Co.**, 107 F. (2d) 712, 713 (C. C. A. 3rd, 1939).

This Court has sustained a directed verdict on the ground of illegality which was revealed **in the opening statement of plaintiff's counsel**, although not specially pleaded. The Court held that where a contract "was a corrupt one, forbidden by morality and public policy • • • the objection to a recovery **could not be obviated or waived by any system of pleading**, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice." And the rule was held applicable "in all cases where the services for which compensation is claimed are forbidden by law, **or condemned by public decency or morality.**" **Oscanyan v. Arms Company**, 103 U. S. 261, 267, 268 (1880).

Obviously, the new Rules of Civil Procedure, to which petitioner looks for relief despite this Court's statement in the **Oscanyan** Case, *supra*, were intended to liberalize stringent codes of pleading, and certainly did not institute "a rigorous kind of pleading not heretofore required." See **Tillman v. National City Bank of New York**, 118 F. (2d) 631, 635 (C. C. A. 2nd, 1941).[2]

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[2] In probing for a basis to assert a conflict between circuits, petitioner cites decisions of the Court of Appeals for the Second and Fifth Circuits purportedly holding that

Petitioner has overlooked a fundamental principle of pleading law.

The function of pleading is to define and limit the issues upon which evidence will be offered at the trial. The purpose is to put the adverse party on notice of the nature of what the pleader intends to prove.

The effect of Rule 12 (h) is to preclude a defendant from **offering evidence** relating to a defense not pleaded, unless an amendment is made under Rule 15 (a).

In the present case, respondents offered no evidence on the question of illegality other than petitioner's own testimony. Petitioner himself proved that his contract was void. All respondents did was to call this to the Court's attention by a motion to dismiss on the ground that petitioner had failed to state a claim upon which relief could be granted. This defense is expressly available at the trial on the merits, whether or not pleaded [Rule 12 (h) (1)].

But even if respondents had neglected in any manner to mention the defense of illegality, it is clear, as this Court has said, that the matter could have been raised by the Trial Judge *sua sponte*.

Thus the only real issues in this case are, and have been by both Courts below, easily disposed of.

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affirmative defenses required to be pleaded under Rule 8 (c) are waived if not pleaded "before trial" (petition, p. 14). But in both cases cited, the affirmative defense was **raised for the first time in any manner in the appellate court.** Of course, that was too late, especially where, as in the cases cited, the defense was **not** illegality. Those cases are clearly inapplicable. And the Second Circuit, in the **Tillman** Case, *supra*, has followed the rule of this Court in holding that failure to plead an affirmative defense is immaterial if **evidence** of the defense is introduced without objection. In the instant case, petitioner not only did not object to the evidence of illegality; the evidence was his own.

The remaining points argued by petitioner were either fully answered in the District Court's opinion or were so lacking in substance as to be completely disregarded.

However, perhaps again out of "an abundance of caution", respondents feel obliged briefly to discuss some of these points, primarily in order to correct the numerous discrepancies and misimpressions in petitioner's presentation of the factual situations involved.

2. Petitioner's Effort to Escape Effect of Illegality of Contract.

(Petitioner's Question 3.)

Petitioner has never undertaken to deny the existence of the principle of public policy applied by the Courts below. On the contrary, unable to cite a single decision of any court in opposition to the fundamental concept that an unfaithful servant will not be permitted to profit by his unfaithfulness, petitioner, as he did in both the District Court and the Court of Appeals, has here frantically attempted to take himself out of the rule. His efforts below were summarily disposed of by Judge Kirkpatrick in one paragraph of his opinion (R. 386a-387a, 78 F. Supp. at 848). They impressed Chief Judge Biggs and Circuit Judges Goodrich and Kalodner so little that they affirmed the District Court *per curiam* on Judge Kirkpatrick's opinion. Yet the same excuses are here advanced to excuse petitioner's perfidy.

Petitioner asserts (petition, p. 8) that his employer, American Oil Company, was not interested in keeping Parkway Oil Company as a customer; that on one occasion in 1941 American threatened to cancel its contract with Parkway, and petitioner "saved the day" (R. 76a); and that since July 1, 1943, according to the Record, there was no written contract between American and Parkway (R. 294a).

As a matter of fact, petitioner's assertions were completely unworthy of belief, since, from 1939 on, every contract between American and Parkway contained a mutual cancellation clause of which American never took advantage (R. 75a). And even if there had been no contract after July 1, 1943, the fact is that Parkway continued to be American's largest customer in the Philadelphia area until settlement on the sale of stock to the Texas Company on August 1, 1945, under an agreement dated June 27, 1945 (R. 60a, 137a). Furthermore, although petitioner said his employer did not seem concerned "when the **contract** was canceled in 1945 by the sale to the Texas Company" (R. 75a), it was a curious coincidence that shortly after that cancellation, petitioner's employment by American was abruptly terminated (R. 58a). Finally, in his deposition, petitioner apparently felt that his employer regarded Parkway as an account worthy of retention when he testified that during the negotiation with the Texas Company he "doubted seriously whether American would release the contract [with Parkway] to a competitor" prior to its expiration (R. 332a-333a).

But aside from the complete incredibility of petitioner's testimony, it was certainly not for him, as sales manager of American, to decide whether American would or would not like to lose its largest customer in the Philadelphia area. The prophylactic rule applied by the Courts below would be totally ineffective if an agent could betray his principal and then claim that the principal had not been harmed. The law denies him that prerogative. In fact, even if proved, the absence of actual harm to the betrayed principal is immaterial, as Judge Kirkpatrick pointed out in his opinion (R. 387a, 78 F. Supp. at 848).

Petitioner also sought some solace from the fact that he had no actual contract of employment with American and the relationship was terminable at will (R. 60a, petition, p. 8). Obviously, nothing in the rule of public policy applied by the Courts below is dependent on a contractual

relationship between the principal and the unfaithful agent. The fact is that petitioner was sales manager of American throughout the period of negotiations with the Texas Company, from 1940 to August, 1945, and throughout this period continuously accepted a salary in excess of $14,000 per year (R. 57a-59a).

Petitioner's effort to bring his conduct within the permissive scope of Section 393 (e), **Restatement of Agency**, was so thoroughly disposed of by Judge Kirkpatrick (R. 385a-386a, 78 F. Supp. at 847) as to require no further comment by us.

But, finally, petitioner himself showed that he did not really believe his own story that his efforts to turn one of American's best customers over to Texas was not hurting American. If this were so, he should have had no hesitancy in telling his employer all about his alleged contract with Mr. Goodman and the ensuing negotiations. He was asked whether he had ever told his superior or anyone else in American, during the period from March 1940 on, that he was advising and consulting with and trying to help Goodman sell his business to Texas. His reply does not indicate in the transcript the complete incredulity and contempt with which he viewed that suggestion, when he answered, with a slight laugh, "Why, of course not" (R. 76a). It was inconceivable to him that anyone would suppose that he would tell his employer of his unfaithfulness.

Similarly, it is significant that on his first visit to the Texas Company, petitioner requested that any letters be addressed to his home and not to his office at American (R. 94a).

Under these circumstances, Judge Kirkpatrick dismissed petitioner's feeble attempt to escape the effect of his immorality as follows (R. 386a-387a, 78 F. Supp. at 848):

> "There was some rather equivocal testimony on the part of the plaintiff to the effect that American

was not greatly interested in retaining Parkway as a customer. In view of the facts that no witness was called to substantiate this testimony, that American renewed its contract with Parkway, after the plaintiff made his contract with Goodman, for a further period of three years during which period American could have cancelled on six months' notice but did not, and the further fact that the plaintiff did not advise American of what he was doing (and in fact made some effort to conceal it by directing Texas to write him at his home address), no finding could have been made that his violation of duty was 'effectively consented to by the beneficiary or principal of the fiduciary.' Restatement, Contracts, Sec. 570. Beyond all this, however, it is to be remembered that the rule is a prophylactic one. 'Actual injury is not the principle the law proceeds on, in holding such transactions void.' Lum v. McEwen, 56 Minn. 278, 57 N. W. 662. '"* * * the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it."' Everhart v. Searle, 71 Pa. 256."

From this statement, petitioner has extracted one clause, referring to his failure to substantiate his testimony, and has construed this as imposing upon him the burden of disproving illegality (petition, p. 16). Obviously, the Trial Court meant no such thing. Acting within its proper sphere under Rule 50 (b) of the Rules of Civil Procedure, the Court merely pointed out that under all the circumstances, including the equivocal testimony of petitioner, it could not be found that petitioner's employer had consented to his violation of duty so as to avoid application of the rule of public policy denying recovery in this case. "* * * nor could a jury find, that a promise by a third party to compensate a sales manager of a corporation for his services in taking a large customer away from his employer is not one that tends to induce a violation of his duty." (R. 385a, 78 F. Supp. at 847).

No more serious is petitioner's effort to introduce a constitutional question into this case. While not setting it forth in his statement of questions, petitioner in his argument suggests that he was denied trial by jury because the jury was not permitted to decide whether, **on his own testimony**, he had violated a fiduciary's duty to his employer (petition, pp. 15-16). If this were to be construed as a denial of trial by jury, virtually every nonsuit, directed verdict, and judgment rendered notwithstanding a verdict, whether in a State or a Federal Court, could be brought before this Court for review. Here there was no factual issue. It was plainly for the Court to decide whether, under uncontroverted facts elicited from the petitioner himself, the contract he sued upon was illegal. **Oscanyan v. Arms Company**, 103 U. S. 261, 266 (1880).

In the same category is petitioner's argument that his freedom of contract has been impaired (petition, pp. 16-17). In support of this point, petitioner cites **Steele v. Drummond**, 275 U. S. 199 (1927), where it was held that the contract in question was **not** contrary to public policy. The chain of reasoning from that case to the clearly immoral conduct of petitioner in the present case is difficult for us to follow.

We mention in passing,—for we feel certain that any constitutional argument has been injected in this case solely as a makeweight,—that no such point has ever been raised by petitioner in either Court below, and so in any event could not be raised for the first time in this Court. **Bailey v. Anderson**, 326 U. S. 203, 207 (1945); **Dorrance et al. v. Pennsylvania**, 287 U. S. 660 (1932); **Western Union Telegraph Co. v. Winland**, 182 Fed. 493 (C. C. A. 8th, 1910); see also **Chicago, Indianapolis and Louisville Railway Company v. McGuire**, 196 U. S. 128, 132 (1905).

Two Courts have now been sufficiently shocked by petitioner's conduct to deny him an opportunity to gain an advantage by reason of his illegal contract. Certainly, if

there is to be any honor in business, if employers are to feel safe in reposing confidence in their employes,—and especially their executives,—if public policy has any meaning in the law, this petitioner cannot be permitted to recover $50,000 on a contract which constituted the clearest kind of breach of the duty he owed the American Oil Company.

3. Petitioner's Motion for Judgment for $83,265.74.

(Petitioner's Question 5.)

Petitioner does not appear seriously at this time to press his motion to increase the judgment originally entered in his favor from $51,990.93 to $83,265.74 (petition, p. 19). However, in his statement of facts, petitioner states that as part of the transaction in which the stock of Parkway Oil Company was sold, a bulk oil plant was conveyed to two of the respondents, trading as P & G Realty Co., "for an inflated, stated consideration," and was leased by them to the Texas Company for twelve years at an annual rental of $30,000, subject to an option to purchase at the end of the term for $197,500 (petition, p. 5). Later (petition, p. 10), petitioner asserts that the value of the bulk plant "was shown by the testimony to be $557,500" (although in his motion he placed the value at $549,940,—R. 379a).

Petitioner's reference for the last statement was to page 140a of the Record, where one of the respondents testified as to the amount of rent and option price on the bulk plant. Apparently petitioner's "proof" of the value of the bulk plant consists solely of his own computation of the total rent for 12 years plus the option price. Small wonder that Judge Kirkpatrick stated, near the end of the trial (R. 287a):

> "Well as the record stands now, there is no evidence in the record, as I see it, that the rental value was

inflated or that the option price was an inflated price. The record now stands devoid of such evidence."

Actually, the uncontradicted evidence establishes that Mrs. Pleet and Mrs. Goodman owned a number of service stations and leases. The Texas Company apparently wanted the service stations and not the bulk plant. Accordingly, an exchange was worked out whereby Parkway Oil Company conveyed the bulk plant to Mrs. Pleet and Mrs. Goodman and they conveyed the stations and leases to Parkway (R. 143a). The value of the consideration on both sides of the exchange was fixed at $185,000 (R. 188a).

The only testimony relied upon by petitioner at the trial to controvert this testimony was the consideration set forth in the deeds of some of the service stations (R. 214a-215a). Obviously, as Judge Kirkpatrick stated at the trial (R. 287a):

> "• • • You cannot establish the value of the property by merely showing what somebody paid for it.
>
> "I am ready to so rule."

Petitioner under no theory could be allowed to recover a commission both on what was sold and what was not sold. The Trial Judge was clearly correct in not even submitting this question to the jury, and in denying petitioner's motion for judgment in the higher amount (R. 391a).

4. Alternative Award of New Trial.

(Petitioner's Question 4.)

As to this point, petitioner satisfied himself solely with citing **Laxier Gas Engine Co. v. DuBois**, 130 Fed. 834 (C. C. A. 3rd, 1904), as seemingly in conflict with the award to respondents of a new trial in the alternative.

The District Court awarded a new trial in the alternative because of the jury's complete disregard of his instructions. The reasons stated by Judge Kirkpatrick

need no amplification (R. 388a-390a, 78 F. Supp. at 848-849). The **Laxier Gas Engine** Case, *supra*, is not in point. There the Trial Judge, in the exercise of the broad discretion reposed in him in such matters, refused to grant a new trial, on the unusual facts there present, since the jury had achieved "substantial justice."

While it may be argued that a Trial Judge is not **required** to grant a new trial on account of the jury's disregard of his instructions, it certainly cannot be said to be an abuse of his discretion to do so. See, e. g., **Frye v. Lyon**, 299 Fed. 926 (App. D. C. 1924); **Mullett v. Milkey**, 113 Vt. 42, 29 A. (2d) 806 (1943); **R. F. Baker & Co., Inc. v. P. Ballantine & Sons**, 127 Conn. 680, 20 A. (2d) 82 (1941).

Certainly where, as here, the jury clearly revealed its failure to comprehend the issues in the case (R. 366a-374a), the Court had no choice but to grant respondents' alternative motion for a new trial.

5. Uncertainty of Petitioner's Contract.

Respondents argued in the Court below that the oral contract upon which petitioner sought recovery was too vague and indefinite to support a cause of action.

In view of the rulings of the District Judge and the Court of Appeals on the other questions involved, this question was not expressly ruled upon.

Respondents mention it here only to apprise this Court of respondents' contention that, particularly under the law of Pennsylvania, petitioner could not prevail even if his contract were not illegal. See **Restatement of Agency**, Section 449, Comments *b* and *c*; **Albright v. Kalbitzer**, 62 F. Supp. 815 (E. D. Pa. 1945); **Turner v. Baker**, 225 Pa. 359, 74 Atl. 172 (1909); **Wilson et al. v. Franklin**, 282 Pa. 189, 127 Atl. 609 (1925); **Dain v. Loeffler et al.**, 256 Pa. 319, 100 Atl. 888 (1917); **Kozhowski et al. v. Litvinas**, 87 Pa. Su-

perior Ct. 406 (1926); **Van Pelt et al. v. Casaccio et al.**, 86 Pa. Superior Ct. 590 (1926).

Similarly, Parkway Oil Company, argued below that the only testimony establishing a contract was to the effect that petitioner would receive a commission on the sale of Parkway's **assets** by the corporation, and therefore, on no theory could a verdict for a commission on the sale of **stock** by the stockholders be supported. The Courts below had no occasion to pass on this contention.

CONCLUSION.

The decision of the Court below is clearly correct. No important question of law or conflict of decisions is presented. No other basis for certiorari even appears in petitioner's Questions Presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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